

CALDWELL LESLIE & PROCTOR, PC  
LINDA M. BURROW, State Bar No. 194668  
*burrow@caldwell-leslie.com*  
CAMERON J. JOHNSON, State Bar No. 266729  
*cjohnson@caldwell-leslie.com*  
725 South Figueroa Street, 31st Floor  
Los Angeles, California 90017-5524  
Telephone: (213) 629-9040  
Facsimile: (213) 629-9022

Attorneys for Defendants PARAMOUNT  
PICTURES CORPORATION, SONY  
PICTURES ENTERTAINMENT INC.,  
and VIACOM INC.

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

DAVID L. WHITEHEAD,

Plaintiff,

v.

MILLENNIUM FILMS; VERIZON  
INC.; PARAMOUNT PICTURES;  
VIACOM; 20TH CENTURY FOX  
FILM; OPRAH WINFREY; TOM  
CRUISE; PAULA WAGNER; DAN  
SNYDER; JP MORGAN; COMCAST  
INC.; SONY; MOONBOT STUDIOS;  
CHIPOTLE MEXICAN GRILL;  
APPLE INC.; SHEILA C. JOHNSON;  
HARVEY WEINSTEIN; THE  
WEINSTEIN COMPANY; COLONEL  
J. GEORGE & S. SALOOM HANNIE  
COMMUNITY HOME, INC. and  
UNKNOWN OFFICERS;  
SOCKRIDER, BOLIN, ANGLIN &  
BATTE PLC; and UNKNOWN DOES  
1-50,

Defendants.

Case No. 15-CV-3564 RGK (AGRx)

**DEFENDANTS PARAMOUNT  
PICTURES CORPORATION, SONY  
PICTURES ENTERTAINMENT  
INC., AND VIACOM INC.'S  
RESPONSES TO PLAINTIFF  
DAVID L. WHITEHEAD'S: (1)  
MOTION FOR LEAVE TO FILE  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT; (2)  
MOTION TO STRIKE AND  
REQUEST FOR SANCTIONS; AND  
(3) MOTION FOR CONTINUANCE**

**[Declaration of Cameron J. Johnson  
filed concurrently herewith]**

The Honorable R. Gary Klausner

Date: February 8, 2016  
Time: 9:00 a.m.  
Crtrm.: 850

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**Page**

I. INTRODUCTION ..... 1

II. BACKGROUND ..... 3

    A. Plaintiff’s Long History as a Vexatious Litigant ..... 3

    B. Plaintiff’s Allegations in the Instant, Frivolous Action ..... 5

    C. Defendants Answer and Attempt to Obtain Deposit Copies of Plaintiff’s Works So Defendants Can Move for Dismissal ..... 6

    D. Defendants Amended Answers and Defendants’ Affirmative Defense Based on the Vexatious Litigant Orders ..... 6

    E. Plaintiff’s Vexatious Motion Practice ..... 7

III. PLAINTIFF’S MOTION FOR LEAVE ..... 7

    A. Plaintiff is Not Required to Seek Leave to File a Motion for Partial Summary Judgment ..... 7

IV. PLAINTIFF’S MOTION TO STRIKE SHOULD BE DENIED ..... 9

V. PLAINTIFF’S MOTION FOR CONTINUANCE ..... 10

VI. CONCLUSION ..... 10

# **TABLE OF AUTHORITIES**

## **Page(s)**

### **Cases**

<i>Art Attacks Ink, LLC v. MGA Entm't Inc.</i> , 581 F.3d 1138 (9th Cir. 2009).....	8
<i>Colaprico v. Sun Microsystems, Inc.</i> , 758 F.Supp. 1335 (N.D. Cal. 1991).....	9
<i>In re Fillbach</i> , 223 F.3d 1089 (9th Cir. 2000).....	10
<i>Hart v. PAE Gov't Servs. Inc.</i> , No. 2:10-CV-1672-KJM-EFB, 2012 WL 2090471 (E.D. Cal. June 8, 2012) .....	8-9
<i>Hupp v. San Diego Cty.</i> , No. 12CV0492-GPC-RBB, 2014 WL 3573337 (S.D. Cal. July 21, 2014) .....	8
<i>McInteer v. Ashley Distrib. Servs., Ltd.</i> , 40 F.Supp.3d 1269 (C.D. Cal. 2014).....	8
<i>Primus Auto. Fin. Servs., Inc. v. Batarse</i> , 115 F.3d 644 (9th Cir. 1997) .....	9
<i>Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.</i> , 109 F.3d 1394 (9th Cir. 1997) .....	8
<i>Whitehead v. Friedman</i> , No. 02-1630 (RWR), ECF No. 48 (D.D.C. Sept. 8, 2003) .....	4
<i>Whitehead v. Paramount Pictures Corp.</i> 145 F.Supp.2d 3 (D.D.C. 2001).....	3, 4
<i>Whitehead v. Paramount Pictures Corp.</i> , 53 F.Supp.2d 38 (D.D.C. 1999).....	4
<i>Whitehead v. Paramount Pictures Corp.</i> , No. 1:08CV792(AJT/TRJ), 2009 WL 1491402 (E.D. Va. May 26, 2009) .....	3, 4

1	<i>Whitehead v. Viacom,</i>	
2	No. CIV.A. DKC 2002-1899, ECF No. 79 (D. Md. Nov. 15, 2002) .....	4
3	<i>Whitehead v. White &amp; Case, LLP,</i>	
4	No. 12-cv-0399, ECF No. 45 (W.D. La. May 16, 2012) .....	4
5	<i>Whitehead v. Wickham,</i>	
6	No. 05-CA-3346, 2005 WL 2874975 (D.C. Super. Ct. Sept. 6, 2005) .....	3, 4
7	<b>Statutes and Rules</b>	
8	Fed. R. Civ. Proc. 11 .....	9
9	Fed. R. Civ. Proc. 12(f) .....	9
10	Local Rule 7-3 .....	8
11	Local Rule 56-1 .....	8

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **I. INTRODUCTION**

2 Plaintiff David L. Whitehead (“Plaintiff”) is a vexatious litigant. He has, for  
3 years, made a practice of filing frivolous legal actions in numerous jurisdictions  
4 across the country in which he accuses dozens of defendants, including movie  
5 studios, lawyers, celebrities, and judges of conspiring to infringe his copyrighted  
6 works.

7 This action is no different. Plaintiff alleges that numerous companies  
8 including Defendants Paramount Pictures Corporation (“Paramount”), Sony Pictures  
9 Entertainment Inc. (“SPE”), and Viacom Inc. (“Viacom”) (collectively,  
10 “Defendants”), and individuals including celebrities Oprah Winfrey and Tom  
11 Cruise, somehow infringed his copyrighted works *The Rise Fall & Rise of a Mayor*  
12 and *Michael Jackson and the Ghost of Ben* through their involvement in the film  
13 *Selma*, which chronicles Dr. Martin Luther King, Jr.’s campaign for equal voting  
14 rights; the film *Lee Daniel’s The Butler*, which follows the life of former White  
15 House butler Cecil Gaines; and a television commercial for Chipotle Mexican Grill  
16 (“Chipotle”) titled *The Scarecrow*. Plaintiff’s complaint—and each cause of action  
17 asserted therein—is meritless, and upon receipt from the Copyright Office of the  
18 works Plaintiffs claims were infringed, Defendants will file a motion for judgment  
19 on the pleadings asking this Court to dismiss, with prejudice, each of Plaintiff’s  
20 claims for relief.

21 Since filing this action, Plaintiff has flooded the Court with nearly thirty  
22 frivolous motions, virtually all of which have either been denied or ordered not filed  
23 due to Plaintiff’s failure to comply with the Local Rules. Plaintiff has now filed  
24 three motions: (1) a motion for leave to file a motion for partial summary judgment  
25 (*see* ECF No. 90); (2) a motion to strike Defendants’ Amended Answers and for  
26 sanctions, based on Defendants’ assertion of an affirmative defense based on the  
27 numerous vexatious litigant orders filed against plaintiff by district courts in other  
28 districts (*see* ECF No. 94); and (3) a motion for continuance of the February 22,

1 2016 scheduling conference (*see* ECF No. 92).

2       ***Motion for Leave.*** Assuming for the moment that this action was properly  
3 filed<sup>1</sup>, Plaintiff does not need leave to file a summary judgment motion. Defendants  
4 therefore do not oppose Plaintiff's Motion for Leave, although Plaintiff's  
5 substantive arguments in the motion make it clear that Plaintiff's motion for  
6 summary judgment will be frivolous. Alternatively, in the event the Court construes  
7 the Motion for Leave as a motion for partial summary judgment<sup>2</sup>, the Court should  
8 deny the motion on the ground that Plaintiff failed to comply with the Local Rules.  
9 If this Court grants Plaintiff leave to file a motion for partial summary judgment,  
10 Defendants request that the Court set hearing on Plaintiff's motion sufficiently in the  
11 future to allow Defendants to prepare and file their motion for judgment on the  
12 pleadings, which Defendants believe will result in judgment for Defendants on all of  
13 Plaintiff's claims.

14       ***Motion to Strike.*** Plaintiff's Motion to Strike should be denied. Plaintiff asks  
15 this Court to strike Defendants' Amended Answers and issue sanctions based upon  
16 Defendants' assertion of an affirmative defense referencing the numerous vexatious  
17 litigant orders that have been issued against Plaintiff. Plaintiff does not, however,  
18 offer any legal reason why Defendants' affirmative defense should be stricken, let  
19 alone why Defendants should be sanctioned for calling Plaintiff's vexatious litigant  
20 orders to this Court's attention.

21       ***Motion for Continuance.*** Finally, Defendants do not oppose Plaintiffs'  
22 Motion for Continuance to the extent it requests that the scheduling conference be

---

23 <sup>1</sup> Defendants believe this action was improperly filed in the Central District of  
24 California in an effort to circumvent vexatious litigant orders entered against  
25 Plaintiff by other courts. Defendants reserve their right to assert the vexatious  
26 litigant orders as a basis for dismissal in their motion for judgment on the pleadings.

27 <sup>2</sup> The Motion for Leave is somewhat ambiguous with respect to whether it was  
28 intended to constitute Plaintiff's motion for partial summary judgment, as it includes  
substantive arguments better addressed to summary judgment.

1 continued from Monday, February 22, 2016 at 9:00 a.m. to Monday, March 28,  
2 2016 at 9:00 a.m. Indeed, the parties have previously submitted a stipulation  
3 agreeing to this date. (*See* ECF No. 98.)

## 4 **II. BACKGROUND**

### 5 **A. Plaintiff's Long History as a Vexatious Litigant**

6 Plaintiff is a well-known vexatious litigant. *See, e.g., Whitehead v.*  
7 *Paramount Pictures Corp.* (“*Paramount I*”) 145 F.Supp.2d 3, 4 (D.D.C. 2001)  
8 (describing Plaintiff’s history as a vexatious litigant and noting that, in the preceding  
9 eight years, Plaintiff had filed no fewer than twenty-three actions); *Whitehead v.*  
10 *Wickham*, No. 05-CA-3346, 2005 WL 2874975, at \*1 (D.C. Super. Ct. Sept. 6,  
11 2005) (recognizing Plaintiff’s “long history of filing vexatious, harassing, and  
12 duplicative lawsuits . . . throughout the country”). Cataloging all of Plaintiff’s  
13 actions in state and federal court is difficult, but a PACER search of federal court  
14 dockets reveals that, as of January 1, 2016, Plaintiff has filed fifty-eight federal  
15 cases including six cases in the Central District of California. Declaration of  
16 Cameron J. Johnson (“Johnson Decl.”), ¶ 2.<sup>3</sup> In these actions, Plaintiff routinely  
17 names dozens of defendants, including media and entertainment companies,  
18 lawyers, and celebrities, and accuses them of having infringed copyrighted works  
19 belonging to Plaintiff. *See, e.g., Whitehead v. Paramount Pictures Corp.*  
20 (“*Paramount II*”), No. 1:08CV792(AJT/TRJ), 2009 WL 1491402, at \*1 (E.D. Va.  
21 May 26, 2009); *Wickham*, 2005 WL 2874975, at \*1. Defendants are unaware of a  
22 single instance in which Plaintiff’s allegations have been found to be substantiated.<sup>4</sup>

---

24 <sup>3</sup> Counsel considered a case as being filed by Plaintiff if the case was filed by: (1)  
25 “David Louis Whitehead,” or (2) “David L. Whitehead” and (i) the plaintiff’s  
26 address was 1906 Scott St., Bossier, LA 71111, or (ii) the defendants were media  
companies or government officials, such as the Director of the CIA.

27 <sup>4</sup> *See Paramount I*, 145 F.Supp.2d at 3-4 (“Every one of Mr. Whitehead’s suits has  
28 been dismissed or resolved in defendants’ favor.”); *see also Whitehead v. White &*



1 Indeed, even Plaintiff seems to acknowledge as much. (*See* Plaintiff’s 9(b) RICO  
2 Case Statement, ECF No. 7 (“Case Statement”) at 1-5 (stating that “[o]ver 50 US  
3 judges have ruled against the plaintiff . . .” and recounting the history of adverse  
4 rulings).)

5 Plaintiff has been declared a vexatious litigant on at least five occasions, and  
6 courts have issued orders prohibiting him from commencing new actions or filing  
7 new documents in pending actions without first obtaining permission from the court.  
8 *See W&C*, ECF No. 45 (ordering the “Clerk of Court . . . to decline any civil  
9 complaint submitted by [Plaintiff] unless the complaint has been presented first to a  
10 district judge of [the] court”); *Paramount II*, 2009 WL 1491402, at \*4 (enjoining  
11 Plaintiff “from filing any new civil actions in the Eastern District of Virginia and  
12 from filing any new motions, papers or requests for relief in any civil actions  
13 currently pending in the Eastern District of Virginia without seeking and obtaining  
14 court approval”); *Whitehead v. Friedman*, No. 02-1630 (RWR), ECF No. 48  
15 (D.D.C. Sept. 8, 2003) (barring Plaintiff “from commencing any action in this court  
16 without first obtaining leave of the court”); *Whitehead v. Viacom*, No. CIV.A. DKC  
17 2002-1899, ECF No. 79 (D. Md. Nov. 15, 2002) (directing that the court “shall no  
18 longer accept for filing anything submitted by Plaintiff . . . in this case or any other  
19 case as therein set forth”); *Wickham*, 2005 WL 2874975, at \*5 (ordering that the  
20 “Civil Clerk’s Office shall not accept for filing anything submitted by [P]laintiff . . .  
21 for any new cases” unless Plaintiff obtains leave of court).

22  
23  
24 \_\_\_\_\_  
25 *Case, LLP* (“*W&C*”), No. 12-cv-0399, ECF No. 45 (W.D. La. May 16, 2012)  
26 (dismissing claims for failure to state a claim); *Whitehead v. Paramount Pictures*  
27 *Corp.* (“*Paramount III*”), 53 F.Supp.2d 38, 54 (D.D.C. 1999) (holding that  
28 Plaintiff’s claims were “patently frivolous” and “objectively unreasonable” and  
dismissing claims); *Paramount I*, 145 F.Supp.2d at 3 (collecting cases in which  
Plaintiff’s claims were dismissed).



1           **B.     Plaintiff's Allegations in the Instant Action**

2           Plaintiff filed the instant action on June 16, 2015. (ECF No. 6 (“Complaint”  
3 or “Compl.”).) Plaintiff’s Complaint comprises 120 paragraphs, alleges eighteen  
4 causes of action, and attaches twenty-eight exhibits. (*Id.*) Plaintiff initially named  
5 eighteen Defendants, including Paramount, SPE, and Viacom, as well as companies  
6 and individuals as diverse as Chipotle, Apple Inc., Comcast, Inc., Oprah Winfrey,  
7 and Tom Cruise. (*Id.*) All of these Defendants, except Paramount, SPE, and  
8 Viacom, were dismissed due to Plaintiff’s failure to serve them. (ECF No. 84.)

9           The gravamen of Plaintiffs’ claims is that Defendants “engaged in fraud” and  
10 “conspir[ed] to massively infringe and steal [P]laintiff’s copyrighted works” *The*  
11 *Rise Fall & Rise of a Mayor* (“*The Mayor*”) (which appears to recount the life of  
12 former District of Columbia mayor Marion Barry, *see* ECF No. 90, Ex. B)<sup>5</sup> and  
13 *Michael Jackson and the Ghost of Ben* (Compl., ¶ 99; *see also id.*, ¶¶ 13-15, 104.)<sup>6</sup>  
14 and incorporate them into the feature films *Lee Daniels’ The Butler* and *Selma*, and  
15 a Chipotle commercial called *The Scarecrow*. (*Id.*, ¶¶ 14-15, 26.) As support for  
16 his contention that his works were infringed, Plaintiff notes the presence of certain  
17 non-protectable historical figures in both works, and lists a number of other

---

18  
19 <sup>5</sup> It is not clear that the excerpts of *The Mayor* Plaintiff provided with his Motion for  
20 Leave are actually excerpts from his copyrighted work of the same name. The cover  
21 page of the excerpts states that the work is copyrighted “1996-2013,” ECF No. 90,  
22 Ex. B at 1 (emphasis added), but the copyright registration attached to the  
23 Complaint states that the work was registered in 1998, *see* Compl., Ex. 2. Adding  
24 further uncertainty, Plaintiff recently emailed counsel claiming that he erroneously  
25 attached the wrong registration to his Complaint and seeking permission to file a  
26 different registration in support of his Complaint (which counsel declined to grant as  
27 having to obtain a new work from the Copyright Office would further delay  
28 Defendants’ motion for judgment on the pleadings). (Johnson Decl., ¶¶ 7-8 & Exs.  
B & C.) For the purposes of resolving the instant Motion for Leave, Defendants  
accept that the excerpts are excerpts of the actual copyrighted work.

<sup>6</sup> Complaint paragraphs after paragraph 44 have been numbered in ECF No. 79-1 (Ex.  
A to Paramount’s First Amended Answer to Complaint).

1 superficial, nonsensical, and, in some cases, non-existent similarities. (*See, e.g., id.*,  
2 ¶ 20 (alleging that former Defendant Oprah Winfrey, who stars as Gaines' wife  
3 Gloria in *The Butler*, "is worry (sic) about her husband the White House servant,  
4 and she does not wish to have sex or romance with Terrence Howard as the  
5 character named Howard" and that the "female character in plaintiff's work [*The*  
6 *Mayor*] tell (sic) male character that the sex isn't working, and that she's worried  
7 about her mayor, Marion S. Barry, who was in trouble"); *id.*, ¶ 23 (alleging that  
8 *Selma* is similar to his work because *The Mayor* includes "depictions of scenes of  
9 Dr. Martin Luther King, Jr." and Dr. King was "[t]he principal character" in  
10 *Selma*).)

11 ***C. Defendants Answer and Attempt to Obtain Deposit Copies of***  
12 ***Plaintiff's Works So Defendants Can Move for Dismissal***

13 Paramount filed its Answer on November 13, 2015. (ECF No. 54.) SPE and  
14 Viacom filed their Answers on November 23, 2015. (ECF Nos. 61, 64.) The  
15 following day, on November 24, 2015, Defendants requested deposit copies of  
16 Plaintiff's works from the United States Copyright Office. (Johnson Decl., ¶ 3. Ex.  
17 A.) The Copyright Office has estimated that Defendants will receive the deposit  
18 copies in early to mid-February. (*Id.*, ¶ 4.) Defendants intend to file motion for  
19 judgment on the pleadings once they receive the requested works. (*Id.*, ¶ 5.)

20 ***D. Defendants Amended Answers and Defendants' Affirmative Defense***  
21 ***Based on the Vexatious Litigant Orders***

22 On December 4, 2015, Defendants each filed Amended Answers to the  
23 Complaint. In the Amended Answers, Defendants asserted a new affirmative  
24 defense based on the numerous Vexatious Litigant Orders entered against Plaintiff,  
25 referencing the orders entered in the United States District Courts for the Western  
26 District of Louisiana, the Eastern District of Virginia, the District of Maryland, and  
27 the District of Columbia, and the Superior Court for the District of Columbia.  
28 (ECF No. 79 at 22-23.)

1 ***E. Plaintiff's Vexatious Motion Practice***

2 Since instituting this action, Plaintiff has filed approximately twenty-eight  
3 motions. These motions have sought a range of relief including recusal of the court,  
4 extensions of time, transfer of the case, and partial summary judgment. (*See, e.g.*,  
5 ECF Nos. 17, 22, 23, 32, 43.) Of the twenty-five motions that have been decided,  
6 all except three early administrative motions (*see* ECF Nos. 2, 4, 10) have either  
7 been denied outright or ordered not to be filed based on Plaintiff's failure to comply  
8 with the local rules. Plaintiff filed his Motion for Leave, Motion to Strike, and  
9 Motion for Continuance on December 28, 2015.

10 **III. PLAINTIFF'S MOTION FOR LEAVE**

11 ***A. Plaintiff is Not Required to Seek Leave to File a Motion for Partial***  
12 ***Summary Judgment***

13 To the extent Plaintiff simply seeks leave to *file* a motion for partial summary  
14 judgment, Defendants do not oppose his request.<sup>7</sup> Defendants note, however, that  
15 Plaintiff's substantive arguments, as previewed in the Motion for Leave, are  
16 frivolous. Defendants therefore respectfully request that this Court set hearing on  
17 Plaintiff's motion for partial summary judgment for no earlier than March 28, 2016,  
18 in order to give the Copyright Office sufficient time to respond to Defendants'  
19 pending request for copies of Plaintiff's works, and to give Defendants sufficient  
20 time to prepare their motion for judgment on the pleadings, which Defendants will  
21 resolve all of Plaintiffs' claims as a matter of law<sup>8</sup>

22 \_\_\_\_\_  
23 <sup>7</sup> Plaintiff's Motion for Leave additionally requests that the Court order the Parties  
24 to attend mediation. (ECF No. 90 at 1.) As Plaintiff's claims are frivolous, and  
25 coupled with Plaintiff's long history of vexatious conduct, Defendants respectfully  
26 oppose Plaintiff's request.

27 <sup>8</sup> While Plaintiff seeks leave to file his motion for partial summary judgment  
28 "pending completion of discovery" (*Id.* at 1), it is not clear what Plaintiff means by  
"pending completion of discovery," or what "discovery" Plaintiff needs to support  
*his own motion*.

1           Alternatively, in the event the Court construes the Motion for Leave as a  
2 motion for partial summary judgment, this Court should deny the motion on the  
3 ground that Plaintiff failed to comply with the Local Rules applicable to summary  
4 judgment motions. Among other things, Plaintiff failed properly to meet and confer  
5 pursuant to Local Rule 7-3 (Johnson Decl., ¶ 6), failed to lodge a “Statement of  
6 Uncontroverted Facts and Conclusions of Law” as required by Local Rule 56-1, and,  
7 most important, failed to attach a complete copy of his work *The Mayor* or copies of  
8 the allegedly infringing works to his affidavit. As a result, Plaintiff has not  
9 submitted the evidence necessary for the Court to evaluate his infringement claim or  
10 conclude that the works are substantially similar.<sup>9</sup> These failures, alone, warrant  
11 denial of Plaintiff’s motion. *See, e.g.*, ECF No. 48 (denying Plaintiff’s previous  
12 motion for partial summary judgment based in part on Plaintiff’s failure to  
13 “introduce[] any evidence” supporting his fraud claim); *McInteer v. Ashley Distrib.*  
14 *Servs., Ltd.*, 40 F.Supp.3d 1269, 1274 (C.D. Cal. 2014) (providing that, when the  
15 moving party bears the burden of proof at trial, it “must present compelling evidence  
16 in order to obtain summary judgment in its favor”); *Hupp v. San Diego Cty.*, No.  
17 12CV0492-GPC-RBB, 2014 WL 3573337, at \*10 (S.D. Cal. July 21, 2014) (noting  
18 that even a pro se plaintiff “must still follow the rules of the court in which he  
19 litigates”); *Hart v. PAE Gov’t Servs. Inc.*, No. 2:10-CV-1672-KJM-EFB, 2012 WL  
20 2090471, at \*10 n.19 (E.D. Cal. June 8, 2012) (citing plaintiff’s “failure to comply

---

22 <sup>9</sup> Among other things, Plaintiff fails to offer any facts showing that there was a “a  
23 reasonable possibility” that Defendants had the opportunity to view Plaintiff’s  
24 works, *Art Attacks Ink, LLC v. MGA Entm’t Inc.*, 581 F.3d 1138, 1143 (9th Cir.  
25 2009), and fails to supply the Court with evidence upon which the Court could find  
26 that Plaintiff’s works are substantially similar in protectable expression to either the  
27 feature films *The Butler* or *Selma* or the Chipotle commercial, *Scarecrow. Dr. Seuss*  
28 *Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 (9th Cir. 1997)  
 (“‘Substantial similarity’ refers to similarity of expression, not merely similarity of  
 ideas or concepts.”).

1 with [the] court’s earlier orders, Local Rules, and the Federal Rules of Civil  
2 Procedure” as a basis for denying motion for summary judgment).<sup>10</sup>

3 **IV. PLAINTIFF’S MOTION TO STRIKE SHOULD BE DENIED**

4 In his Motion to Strike, Plaintiff asks this Court to strike Defendants’  
5 Amended Answers, and in particular, Defendants’ Fourteenth Affirmative Defense,  
6 which references Plaintiffs’ vexatious litigant orders, on the ground that the contain  
7 “extraneous materials” and thereby “prejudice[]” him. (ECF No. 94 at 4.)

8 Under Federal Rule of Civil Procedure 12(f), a court may strike any  
9 “insufficient defense or any redundant, immaterial, impertinent, or scandalous  
10 matter.” Motions to strike are, however, disfavored and “should not be granted  
11 unless it is clear that the matter to be stricken could have no possible bearing on the  
12 subject matter of the litigation.” *Colaprico v. Sun Microsystems, Inc.*, 758 F.Supp.  
13 1335, 1339 (N.D. Cal. 1991). That Plaintiff has been declared a vexatious litigant  
14 on multiple occasions, for filing complaints much like the complaint he filed here, is  
15 *highly* relevant to the subject matter of this litigation, and Plaintiff thus fails to  
16 establish any reason why Defendants’ Fourteenth Affirmative Defense should be  
17 stricken. Plaintiff also fails to show that the defenses asserted in Defendants’  
18 answers are not “warranted by existing law or by a nonfrivolous argument for  
19 extending . . . existing law or for establishing new law.” *See* Fed. R. Civ. Proc. 11,  
20 or were asserted in bad faith, *see Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d  
21 644, 648 (9th Cir. 1997) (holding that, in order for a court to award “sanctions under  
22 its inherent powers . . . , the court must make an explicit finding that counsel’s  
23 conduct ‘constituted or was tantamount to bad faith’”) (citation omitted). To the  
24 contrary, it is entirely reasonable to assert the numerous vexatious litigant orders

---

25  
26 <sup>10</sup> If the Court does construe the Motion for Leave as a motion for partial summary  
27 judgment and does not deny the motion on the basis of the issues cited above,  
28 Defendants should be permitted leave to file an opposition addressing Plaintiff’s  
substantive arguments.

1 entered against Plaintiff as a basis for dismissal. *See In re Fillbach*, 223 F.3d 1089,  
2 1091 (9th Cir. 2000) (observing that, where plaintiff files in one district court “to  
3 avoid a vexatious litigant order in another, it is clear that a district court has  
4 authority to dismiss for that reason in appropriate circumstances.”). Plaintiff’s  
5 request for sanctions should therefore be denied.

6 **V. PLAINTIFF’S MOTION FOR CONTINUANCE**

7 Plaintiff’s Motion for Continuance requests that the scheduling conference in  
8 this matter be continued from February 22, 2016 until March 28, 2016. (ECF No.  
9 92 at 2.) Defendants do not oppose this request. Although it is unclear, the motion  
10 also appears to request that the Court permit the Parties confer telephonically rather  
11 than in person when preparing their joint statement for the upcoming schedule. (*Id.*)  
12 Defendants do not oppose this request and, indeed, have already stipulated to the  
13 March 28 date Plaintiff requested. (ECF No. 98.)

14 **VI. CONCLUSION**

15 For the reasons set forth above, Defendants do not oppose Plaintiffs’ Motion  
16 for Leave, although Defendants believe any motion for partial summary judgment  
17 that Plaintiff files will be frivolous. If the Court does grant Plaintiff leave to file a  
18 motion for partial summary judgment, Defendants respectfully request that the  
19 Court order that: (1) Plaintiff’s motion for partial summary judgment be served by  
20 February 24, 2016 and set for hearing on Monday, March 28, 2016; (2) Defendants’  
21 opposition be due on March 14, 2016; and (3) Plaintiffs’ reply be due on March 21,  
22 2016. As to Plaintiff’s Motion for Leave, for the reasons set forth above,  
23 Defendants respectfully request that the Court deny the motion.

24 ///

25 ///

26 ///

27 ///

28 ///



Finally, Defendants do not oppose Plaintiff's Motion for a Continuance to the extent it requests that the scheduling conference in this matter be continued until March 28, 2016.

DATED: January 15, 2016

CALDWELL LESLIE & PROCTOR, PC  
LINDA M. BURROW  
CAMERON J. JOHNSON

By /s/

---

LINDA M. BURROW

Attorneys for Defendants PARAMOUNT  
PICTURES CORPORATION, SONY  
PICTURES ENTERTAINMENT INC., and  
VIACOM INC.